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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554

In the Matter of )

Request for Comment on Broadband )  
PCS C and F Block Installment )  
Payment Issues )

WT Docket No. 97-82

RECEIVED

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To: Chief, Wireless Telecommunications Bureau

Federal Communications Commission  
Office of Secretary

COMMENTS OF NORTHCOAST COMMUNICATIONS, LLC

Northcoast Communications, LLC ("Northcoast"), pursuant to FCC Public Notice DA 97-679 and 47 C.F.R. § 1.419, hereby files these Comments in response to the Commission's request for additional comments in WT Docket No. 97-82.<sup>1</sup> In FCC Public Notice DA 97-679, the Commission requested comment on various proposals that it has received to restructure C and F block debt, and the FCC's broadband PCS Entrepreneur Block installment payment procedures. All but one of the proposals filed request significant revisions to, and relaxation of, the installment payment obligations of entrepreneur block licensees. Many of the proposals were filed by the largest C block auction winners, including the three largest C

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<sup>1</sup> Northcoast was the high bidder on 49 D, E and F ("DEF") block licenses in the FCC's broadband PCS DEF block auction. Forty four of those 49 licenses are F block licenses, which are subject to the Commission's installment payment financing procedures. The Commission has already granted 32 of Northcoast's 49 license applications. Consequently, Northcoast has a significant interest in the outcome of this proceeding.

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block licensees.<sup>2</sup> Northcoast strenuously opposes any attempts to modify entrepreneur block installment payment frequency, suspend interest payments, reduce the principal amount of debt, or in any other way to relax the entrepreneur block installment payment obligations of C and F block licensees.

## **I. BACKGROUND**

The FCC first received congressional authority to award licenses for certain portions of the electromagnetic spectrum via competitive bidding (auctions) in August 1993. By September 1993, the first Notice of Proposed Rule Making to establish general auction rules had been commenced, general auction rules were established in April 1994<sup>3</sup>, and reconsidered and largely affirmed by November 1994.<sup>4</sup> In addition, separate, service specific auction rules for broadband PCS were established in 1994<sup>5</sup>, and for several other auctionable services since 1994.<sup>6</sup> As the Commission's docket in PP Docket No. 93-253 attests, both the FCC's general auction rules and the specific broadband PCS auction rules adopted by the Commission were the subject of *extensive* public comment, challenge and debate before their final adoption.

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<sup>2</sup> See *FCC Public Notice DA 97-679*, Appendix A, Gutierrez Letter (on behalf of NextWave Communications, Inc. and DCR PCS, Inc., among others); Informal Proposal of General Wireless, Inc.

<sup>3</sup> See *Second Report and Order in PP Docket No. 93-253*, 9 FCC Rcd 2348 (1994) ("Second Report and Order").

<sup>4</sup> See *Fifth Memorandum Opinion and Order in PP Docket No. 93-253*, 10 FCC Rcd 403 (1994) ("Fifth MO&O").

<sup>5</sup> See *Fifth Report and Order in PP Docket No. 93-253*, 9 FCC Rcd 5532 (1994) ("Fifth Report and Order").

<sup>6</sup> E.g., Narrowband PCS, IVDS, Multipoint Distribution Service, Specialized Mobile Radio and General Wireless Service.

When the FCC's C block auction ended in May 1996, the net total revenue raised was an astounding \$10.2 billion.<sup>7</sup> Eight months later, the DEF block auction closed, with a total net revenue of \$2.5 billion. While the trade press has reported since the summer of 1996 on Wall Street's reticence to finance certain C block winners who were highly-leveraged, incontrovertible evidence of the C block financing crunch appeared in March 1997, with the Chapter 11 bankruptcy filing of Pocket Communications, the FCC's suspension of C and F block installment payment obligations, and the subsequent numerous informal and formal requests filed by C block licensees requesting that the FCC restructure their bid payment obligations.

**II. THE COMMISSION SHOULD STRICTLY ENFORCE ITS EXISTING INSTALLMENT PAYMENT AND DEFAULT RULES**

On May 7, 1997, Cook Inlet Region, Inc. ("CIRI") filed a Petition for Rulemaking ("CIRI Petition") in which it urged the Commission to establish uniform rules and procedures for FCC licensees that are delinquent or in default on their installment payment obligations, or who otherwise seek modification of those payment obligations. The Commission is considering the CIRI Petition in the context of its pending competitive bidding rule revision rule making proceeding.<sup>8</sup> Northcoast agrees with CIRI's opposition to the "large scale bail-outs"<sup>9</sup> of C block licensees of the type proposed by MCI Telecommunications Corporation

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<sup>7</sup> See *FCC Public Notice DA 96-716*, released May 8, 1996. That figure was almost double the most optimistic C block auction revenue projections that had been made prior to the start of the C block auction. See *Telecommunications Reports*, May 13, 1996.

<sup>8</sup> See Amendment of Part 1 of the Commission's Rules -- Competitive Bidding Proceeding, *Order, Memorandum Opinion and Order, and Notice of Proposed Rule Making*, WT Docket No. 97-82, FCC 97-60, (released February 28, 1997).

<sup>9</sup> CIRI Petition at 7.

and General Wireless, Inc. While Northcoast expresses no opinion as to whether additional rules, or rule revisions, are needed to address the C block financing crisis and the potentially large number of C block license defaults,<sup>10</sup> Northcoast strongly supports CIRI's position that "[s]anctioning this conduct [by restructuring debt obligations] will 'only encourage speculation [in future auctions] instead of legitimate applicants who can attract capital.' "<sup>11</sup> By not only sanctioning, but coordinating a mass "bail-out" of C block bidders, the Commission would be making both bad law and bad policy.

**A. The Commission Should Not Engage in Retroactive Rulemaking in Order to Assist One Class of FCC Licensees**

During each phase of its competitive bidding rule making proceeding, the Commission carefully examined how best to administer licensee installment payment obligations, and stressed that substantial penalties would be assessed for bid withdrawal or licensee default or disqualification. The Commission reasoned that "[t]hese penalties will provide strong incentives for potential bidders to make certain of their qualifications and financial capabilities before the auction so as to avoid delays in the deployment of new services to the public that would result from litigation, disqualification and re-auction."<sup>12</sup> On reconsideration of its broadband PCS auction rules, the FCC specifically stated that anything other than strict

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<sup>10</sup> Specifically, Northcoast believes that legally sufficient rules already are in place to address any C block default and reauction scenarios that may arise.

<sup>11</sup> CIRI Petition at 6-7, *citing Fifth MO&O*, 10 FCC Rcd at 460.

<sup>12</sup> *Second Report and Order*, 9 FCC Rcd at 2382.

installment payment obligations "could encourage speculation instead of legitimate applicants who can attract capital."<sup>13</sup>

When they filed their FCC Form 159s and FCC Form 600s, all C and F block auction participants certified that they had familiarized themselves with relevant FCC rules, which include the FCC's competitive bidding rules specifying license installment payment obligations. Presumably, all C block participants were also aware of the amounts that they were bidding for C block licenses, and their consequent financial exposure. Unfortunately, despite the specific rules setting forth the installment payment obligations for small businesses benefitting from government financing, and the license default penalties that would apply for failure to meet these obligations, several major players in the C block auction apparently speculated that they could later obtain the capital needed to meet their debt obligations.

A basic, underlying tenet of the Administrative Procedure Act ("APA") is that the public has the opportunity to be aware of and participate in an administrative agency's adoption of substantive rules that affect those regulated. The FCC complied with the APA's rule making requirements in developing both general and broadband PCS auction rules. C block auction participants not only had the opportunity to participate in the broadband PCS auction rule proceeding, many current C block licensees in fact did participate. The FCC should not now go back and change its installment payment rules [for entrepreneur block licensees only] because certain C block entities cannot comply with the financial obligations of which they certified they were aware. Such a course of action would create an unlevel playing field, be patently unfair to entrepreneur block licensees that bid responsibly and

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<sup>13</sup> *Fifth MO&O*, 10 FCC Rcd at 460.

within their financial capabilities, and would undermine the certainty to which interested parties governed by administrative agencies are entitled. In this context, the APA will have served no purpose if the FCC's broadband PCS entrepreneur block auction rules are changed simply because they now are disadvantageous to a particular class of entities, despite the fact that other affected parties not only relied on those rules [to their detriment], but in fact complied with those rules.

**B. Relaxation of Installment Payment Obligations Will Benefit C Block Entrepreneurs at the Expense of F Block Entrepreneurs**

Commission restructuring of C and F block debt and relaxation of installment payment obligations would have a negative impact on F block licensees while benefitting C block licensees, and consequently would violate the APA's mandate that similarly situated parties be treated the same.<sup>14</sup> The Commission should not ignore the fact that F block auction participants were also fully aware of the installment payment obligations that they would undertake if they won broadband PCS licenses at the DEF block auction. Aware of their potential payment obligations, DEF block bidders carefully reviewed the bids placed during 276 rounds of bidding, and still pledged to pay the U.S. Treasury *over \$2.5 billion* for 1,479 DEF block licenses.<sup>15</sup> The FCC's DEF block auction can only be characterized as a complete success, as evidenced by the wide dissemination of broadband PCS licenses to small business,

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<sup>14</sup> See *McElroy Electronics Corp. v. FCC*, 990 F.2d 1351, 1365 (D.C. Cir. 1993).

<sup>15</sup> See *FCC News Release 71744, Broadband PCS D,E and F Block Auction Closes*, released January 14, 1997; see also *FCC Public Notice DA 97-81, D, E and F Block Auction Closes*, released January 15, 1997.

and the financial community's present interest in assisting the F block with securing capital and vendor financing.

There are a variety of reasons for Wall Street's willingness to extend financing to F block licensees, such as the substantial differences in the amounts paid for spectrum on a per pop basis between the C and F blocks, and the fact that a great many C block licensees are highly leveraged. However, if the FCC implements an across the board debt reduction along with installment payment modifications, the Commission would dramatically alter the existing "financing playing field" in favor of the C block licensees, and would be responsible for seriously threatening existing financing opportunities for F block licensees. Finally, if the various debt restructuring and payment modification proposals are adopted, the Commission would be impermissibly favoring C block licensees over F block licensees, while also *penalizing* F block licensees who both complied with the FCC's auction rules and policies, and proved that the FCC's auction system could work.

**C. Easing Payment Obligations for Broadband PCS Entrepreneurs Only  
Constitutes Disparate Treatment of Similarly Situated Entities**

The Commission issued Public Notice DA 97-679 to seek comment on broadband PCS entrepreneur block installment payment issues, in the context of its pending general auction rule revision proceeding. However, the proposed revisions for which the FCC seeks comment would apply *only* to C and F block licensees. A large scale relaxation of the broadband PCS entrepreneur block installment payment obligations will subject the Commission to numerous legal challenges due to the disparate treatment of similarly situated entities. For example, the

FCC offered installment payment financing for qualified bidders in the MDS auction,<sup>16</sup> yet it does not propose to relax the installment payment obligations for qualified MDS licensees. Further, despite its present consideration of proposals to *significantly* restructure C and F block debt and installment payment obligations, thus far the Commission has shown little willingness to relax the payment obligations of certain C block licensees who had trouble making second down payments.<sup>17</sup> Finally, the Commission should expect challenges from both C block licensees who are ready, willing and able to meet their installment payment obligations due to their adherence to a responsible business plan, and from the numerous F block licensees who did not get caught up in the C block bidding frenzy, and bid reasonably, without expectation of a second chance if their first, aggressive business plan failed.

**D. A Government Bail-Out of Government Debt Only for Certain Entities Would Create Poor Policy**

As a matter of policy, relaxation of entrepreneur block installment payment obligations would be fundamentally unfair to those C block licensees who have honored their financial obligations to the government, and to the majority of C and F block licensees who never requested such relief. At a minimum, the Commission would be taking away any competitive advantage these parties may have gained by "playing by the [FCC's competitive bidding] rules". In addition, relaxation of the existing C and F block installment payment rules would

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<sup>16</sup> See *Report and Order in MM Docket No. 94-131, PP Docket No. 93-253*, FCC 95-230, released June 30, 1995, at ¶¶ 182-83.

<sup>17</sup> See, e.g., *Order, Mountain Solutions LTD., Inc., Request for Waiver of Section 24.711(a)(2) of the Commission's Rules*, DA 97-891 (released April 28, 1997); *Order, Carolina PCS I Limited Partnership, Request for Waiver of Section 24.711(a)(2) of the Commission's Rules*, DA 97-890 (released April 28, 1997).



be bad policy because it would create uncertainty as to how the Commission will handle situations of licensee default that occur outside of the C and F block context.

**E. If Adopted, Restructured Entrepreneur Block Debt Should be an Option Structured Pursuant to Commercially Reasonable Terms**

As an F block licensee eligible for installment payment financing, Northcoast is not seeking to have its debt to the United States government restructured, its debt payment schedule modified, or the general rules governing its installment payment obligations relaxed. Consequently, if the Commission does restructure broadband PCS entrepreneur block debt and relax the installment payment rules, this should be structured as a "debt workout" option of which entrepreneur block licensees *may avail themselves, but are not required to*. Further, if an eligible licensee does take advantage of the debt workout option, the FCC should impose some mechanism to recoup the lost principal and interest. For example, in the commercial lending context, entrepreneurs often seek to restructure debt owed to banks and other creditors. However, an *essential* element of all debt restructuring is that the debtor pays the creditor some type of consideration for extending or renegotiating the debt. The consideration could be agreeing to additional debt owed to the creditor, paying a higher interest rate, or giving the creditor equity in the business. In essence, the debtor should compensate the creditor for the additional risk assumed by the creditor, and the creditor's inability to reinvest the capital that it is owed in other, more secure investments.

If the Commission restructures entrepreneur block debt and relaxes the entrepreneur block installment payment obligations, it should follow basic commercial lending principles and adopt some type of mechanism for recouping at least a portion of the lost debt from licensees that choose to restructure. By following commercially reasonable lending practices,

the Commission would be able to recoup some of the written-off debt that otherwise would be a complete loss to the U.S. Treasury.

### **III. CONCLUSION**

For the reasons stated above, Northcoast respectfully urges to Commission not to adopt any modifications to the C and F block installment payment requirements, nor restructure any of the existing debt owed by C and F block licensees.

Respectfully submitted,  
**NORTHCOAST COMMUNICATIONS, LLC**

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